No. 2562.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,

Appellant,

vs.

YEP KIM YUEN,

Appellee.

BRIEF FOR APPELLANT

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Filed this.....day of June, 1915.
FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

THE JAMES H. BARRY COMPANY
SAN FRANCISCO

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FACTS.

The certified record from the Department of Labor which is filed as an exhibit in its original form in this case shows that the alien Chinese boy, Yep Kim

Yuen, fifteen years of age, applied for admission at San Francisco, California, as the son of a citizen of the United States, Yep Lung Gon, on the 20th day of September, 1913. The father alleged that he was a citizen by reason of his birth in this country, in San Francisco some 46 years before, and that he departed for China when quite young and returned to the United States in 1890, when he was admitted on *habeas corpus* proceedings by the District Court as a citizen. A certified copy of this court record No. 9071, with a photograph affixed thereto is attached to the original immigration record in the case of the father, Yep Lung Gon, and is filed as one of the exhibits in the case of his son, Yep Kim Yuen. The father's record shows that subsequent to the year 1890, he made two trips to China, being admitted on each occasion on the presentation of a copy of this court record, his last admission occurring in May, 1913, several months before his son applied for permission to enter. On September 30, 1913, the Commissioner of Immigration, Samuel W. Backus, after an extensive hearing at the Immigration Station at Angel Island, California, filed his finding and decree (Record, 24-26). The Commissioner ruled that the father's status as a citizen was apparently valid, but that the relationship of father and son was not satisfactorily established because of the many discrepancies in the testimony. The alleged son was accordingly denied admission. That portion of the Commissioner's

finding applicable to this discussion (Record, 26-24) is set forth as follows:

> "According to the alleged father he is a *res adjudicata* native. He claims to have been admitted from a visit to China by United States District Court, Northern District of California, proceeding No. 9071. A copy of said record shows that a Chinaman of the same name was discharged by said court January 9, 1890, as a native. He made application to depart as a native in July, 1912, the investigating inspector recommending unfavorably because in his opinion, the then applicant was not the identical person in whose behalf said court record was issued, the photograph attached to said record not comparing favorably with the then applicant. However, he was favorably endorsed by this office, as he was shown to have been admitted at this port, by this office, as a native on two occasions by virtue of the finding of the court proceeding No. 9071 above mentioned."
>
> . . . . . .
>
> "Although there seems to be considerable resemblance between the applicant and his alleged father, judging from the photographs, it seems that the foregoing contradictions and inconsistencies would not have materialized if it were a fact that the relationship claimed exists. The applicant is accordingly denied admission and advised of his right to appeal."

On the appeal the Secretary of Labor, in affirming the decision of Commissioner Backus in excluding the boy, reversed the Commissioner on the questions of fact in that he ordered the boy deported upon different grounds. When the matter was first referred

to the Secretary of Labor the Acting Commissioner-General reopened the case and made a further examination and determined that the relationship of father and son did exist and that those representations were bona fide, but that the father was an imposter in claiming citizenship under the court record in the writ of *habeas corpus* issued in 1890 to a Chinese person of the name of Yep Lung Gon.

To show what a fair and painstaking review was made of the evidence the court is referred to the memorandum for the Acting Secretary (Record, 35-36) which shows the methods pursued in the Department of Labor to ascertain the identity of the father with the photograph attached to the court record.

The Acting Secretary, upon reviewing the case (Record, 35-36), signed the following order:

"DEPARTMENT OF LABOR
Office of the Assistant Secretary
Washington

53560-258 November 18, 1913.

Memorandum for the Commissioner General in re YEP KIM YUEN:

The question of the identity of the father with the person of same name decided in 1890 to be an American citizen, appears to be the decisive one in this case. As appellant has not yet had his 'day in court' on that question, the case is reopened for proof of identity.

In the absence of such proof after reasonable opportunity to produce it, exclude.

LOUIS F. POST,
Acting Secretary."

The case was then reopened and the entire record was sent back to San Francisco on December 1, 1913, for a personal comparison of the father with the photograph in the court record No. 9071. On December 10, 1913, two witnesses were called and testified on behalf of the father in the matter of his identity. Subsequently two affidavits with photographs attached were filed in support of the father's claim (Record, 65-68). On February 6, 1914, the complete record containing all the supplemental evidence taken, was again forwarded to the Commissioner-General of Immigration at Washington, D. C. (Record, 70-73) by the Commissioner of Immigration at Angel Island, California. When the matter was finally referred to the Secretary of Labor (Record, 74-75) the following memorandum of decision which bears the signature of approval of the Acting Secretary J. B. Densmore, was filed:

"U. S. DEPARTMENT OF LABOR
BUREAU OF IMMIGRATION
WASHINGTON

WJP
In answering refer to
No. 53560/258 Feb. 14, 1914.

In re APPEAL: Case of YEP KIM YUEN, alleged son of a citizen.

Supplemental Memorandum
for THE ACTING SECRETARY:

This case was originally presented to the Department in November, last, upon a memorandum (indicated by marker hereunder) which contained a complete summary of the evidence, and in which

the Bureau reached the conclusion that the alleged father of the applicant had failed to satisfactorily establish his status as a citizen of the United States and that the applicant was not, therefore, entitled to admission. At the suggestion of the Acting Secretary (Mr. Post) the case was returned to the San Francisco office in order that the alleged father might have a further opportunity to establish his citizenship by the submission of evidence showing his identity with the person (who he claims to be) discharged on *habeas corpus* proceedings as a citizen by the District Court at San Francisco on January 9, 1890 (court record No. 9071). The record is now returned with transcript of the additional evidence taken, and certain letters, etc., which have been filed by those interested in the case.

In view of the additional showing (particularly in view of the reported attitude of the alleged father with respect to the applicant) the Bureau is quite satisfied that the boy is, in fact, the genuine son of this man. The question of citizenship of the alleged father, however, stands practically where it did when the record was previously considered by the Bureau and the Department. It is still contended that he is the party who was discharged as per certified copy of court record submitted, and is the person represented by the photograph which appears in the original court record and copies of which are contained in the record herewith. From a very minute comparison of these photographs the Bureau is not able to believe that this can possibly be (in this connection see previous Bureau memorandum, in which is reported an interview with Chief Flynn, of the Secret Service Division of the Treasury Department, to whom the photographs above referred to were exhibited).

There is no question but that the alleged father has been resident in this country for a great many years—possibly as long as he claims he has—but

this circumstance does not relieve him of the necessity of establishing the contention which he makes of having been born in the United States. The most convincing evidence in his favor is the fact that Chinese Inspector and Interpreter Gardner compared his signature, made quite recently, in connection with the identification papers which were filed in the present applicant's behalf, with the signature of the party discharged by the court which appears on the original court record, and was of the opinion that they represented the signatures of the same person. He suggests the possibility of a substitution of photographs (not altogether unknown in these cases) on the original court record, but nowhere in the record is it stated that the original court file in the matter bears any indications of having been tampered with.

After a very careful consideration of all of the evidence of record in this case, the Bureau is again constrained to recommend that the excluding decision be AFFIRMED and DEPORTATION ordered.

F. H. LARNED,
Acting Commissioner-General.

Approved
J. B. D.
WJP-c
Advise Mr. Wolf.
Mr. Wolf desires an oral hearing before the Actg. Secy.

DEPARTMENT OF LABOR

WJP 2/17/1914.

Memo. for consideration in connection with case of Yep Kim Yuen.

This case has heretofore been discussed fully with Mr. Wolf, and he is aware of the views entertained in the Bureau with respect to the identity of the alleged father with the person discharged

by the Dist. Court, and also the views of Chief Flynn, of the Secret Service, T.D. At my suggestion, in order that there might be no possibility of mistake, he and I to-day called at Police Headquarters with the photographs. Chief Boardman called in his two identification experts and exhibited the photographs to them. Both were positive and emphatic in asserting that they could not possibly be photographs of one and the same person, assigning the same reasons as did Chief Flynn and as appear in former memo. of the Bureau. It seems to me the fraudulency of the case is established.

W. J. P."

LAW.

The formal assignment of errors (Trans., 16) is not to be considered a part of this appeal, but the general error alleged by appellant is that the questions of fact determined by the Secretary of Labor were not open to review by the District Court upon the hearing of the petition for a writ of *habeas corpus*. On the hearing of the Government's demurrer (Trans., 11) the District Court took the testimony of Herbert F. Dugan and John E. Gardiner, two witnesses who were called on behalf of the alien. Their testimony was that they were of the opinion that the picture attached to the court record No. 9071, being the writ of *habeas corpus* issued in 1890, was the likeness of the father, Yep Lung Gon. Witness Gardiner further testified that the signature upon the court record appeared to be the signature of father. At the conclusion of this testimony the District Court over-

ruled the demurrer and reversed the findings of fact of the Secretary of Labor by holding that the father's claims to citizenship in the United States were not valid and therefore his son, Yep Kim Yuen, could not be admitted into the country.

It is a rule long established by decisions of the United States Supreme Court that where the immigration proceedings have been regular and all hearings fair, so that the alien has had every opportunity to present his claims, the District Court on a petition for a writ of *habeas corpus* will not disturb the findings of fact of the Secretary of Labor. A hearing could not possibly have been fairer than that given by the immigration officials and the Secretary of Labor in this case, particularly since such exhaustive efforts were made to avoid all possibility of deciding erroneously.

The question of fact decided by the Secretary of Labor in this case that the father had not established his claims to citizenship in the United States and therefore his son, Yep Kim Yuen, could not enter, was the final decision in this matter. In the case of *United States* v. *Ju Toy,* 198 U. S., 253; 25 Sup. Ct., 644; 49 L. ed., 1040; it was held that where a Chinese seeks entrance into the country, claiming citizenship in the United States, has been denied admission upon a fair question of fact presented to the Secretary of Labor, the courts have no jurisdiction to overrule the secretary and compel the admission of such a person

on the ground that the conclusion of the immigration officials was wrong:

> "Under the Chinese exclusion and the immigration laws, where a person of Chinese descent asks admission to the United States, claiming that he is a native-born citizen thereof, and the lawfully designated officers find that he is not, and upon appeal that finding is approved by the Secretary of Commerce and Labor, and it does not appear that there was any abuse of discretion, such finding and action of the executive officers should be treated by the courts as having been made by a competent tribunal, with due process of law, and as final and conclusive; *and in habeas corpus proceedings, commenced thereafter, and based solely on the ground of the applicant's alleged citizenship, the court should dismiss the writ, and not direct new and further evidence as to the question of citizenship.*"

Justice Holmes in the case of *Chin Yow* v. *United States,* 208 U. S., 8, 11; 28 Sup. Ct., 201; 52 L. ed., 369, also spoke most emphatically on the finality of the Secretary of Labor's rulings on a question of citizenship:

> "If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final; but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter, and of persons alleging them-

> selves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what we must analyze a little. . . . But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

It is true that the father, Yep Lung Gon, had been allowed to go to China and return several times as a citizen, simply upon a presentation of the court record in question and it is admitted that the immigration officials at Angel Island, California, formerly believed that the father was the bona fide owner of this court decision. In allowing his various entries into the United States, under a previous mistake, the immigration department is in no way bound and it has repeatedly been held by the courts, including the Supreme Court, that their former favorable decisions were not *res adjudicata,* but were subject to review and change at any time. *The Japanese Immigration Case,* 189 U. S., 281; *Pearson* v. *Williams,* 202 U. S., 281; *U. S.* v. *Williams,* 175 Fed., 275.

Having become satisfied that the father of the applicant had previously perpetrated a fraud upon the Government and was endeavoring to repeat such illegal use of the court document in the case of his son, the Department could hardly have taken any

other action than to order deportation, and its decision was reached after a most painstaking investigation and full opportunity afforded counsel, both in Washington and in San Francisco, California, to submit evidence.

The finding of the Department on the question of identity was purely a question of fact, and under the numerous court decisions was final and conclusive. The District Court, however, assumed jurisdiction apparently upon the theory that the writ of *habeas corpus* issued in 1890, on which the photograph was submitted for identity was an old record in said court and for that reason it had jurisdiction to make the comparison. On taking additional evidence the District Court reached a conclusion directly opposed to that determined by the administrative officers upon whom Congress has seen fit to confer exclusive jurisdiction. That this was error the appellant respectfully cites to this Honorable Court the case of *ex parte Long Lock,* 173 Fed., 208, in which Judge Ray decided after a most careful review of the Supreme Court decisions above quoted that the District Court could not reverse the Secretary of Labor on a question of fact where that official had determined that a court record giving a Chinese person American citizenship was not sufficiently identified with him and had ordered his exclusion from the United States.

It is not disputed that the District Court may take judicial notice of its own records and that in a case where the question of a person's identity with a court

record comes up *de novo* before the court, jurisdiction is accorded to determine the question. It is admitted that if the court should release from custody a person as a citizen of the United States upon a writ of *habeas corpus* today and that tomorrow this same person should appear before the same court and the court should take testimony, with the result that it identifies this person as the person who was granted the writ on the previous day, that the jurisdiction of the court would not be questioned. The court would, in such a circumstance, be determining the matter exclusively concerning its own records. In the case of the father, Yep Lung Gon, however, there is an intervening circumstance which changes the whole matter. The Secretary of Labor has been given the power to determine an alien's status and this was done entirely within his prerogative. The Secretary does not in any way attack the validity of this court record of 1890. He does not in any way question that decision nor that the picture attached is the photograph of some Chinese person bearing the name of Yep Lung Gon and who appeared before the court and was discharged. But where the decision of the Secretary has intervened in determining the question of identity it is an unwarranted assumption of power for the District Court to rule that that executive officer was wrong.

Judge Ray in *ex parte Long Lock, supra,* had this

same question before him and his meaning is unequivocal.

> "Inspector Sperry expressly states here that he did not think the identity of this petitioner with the Long Lock of the certificate had been established. The Department of Commerce and Labor was not satisfied, and this court is far from satisfied, that this petitioner is Long Lock apprehended and tried before and discharged by Commissioner Johnson in 1897. Where and when he obtained the certificate issued by Johnson is not shown, except by the bare testimony of the petitioner himself, who bore and was known by a different name in 1905 and 1907, and whose credibility was shaken on his examination before Inspector Sperry. It is not shown that from 1897 to 1905 the petitioner bore the name Long Lock.
>
> *"This petitioner was before Inspector Sperry, who saw him and observed his manner of giving testimony. The inspector was far better able to judge of his candor and truthfulness than any court or judge can be, and, under the decisions of the Supreme Court, in my judgment, it would be an unwarranted assumption of power to override the prior determinations of the executive officers and department to whom Congress has lawfully and constitutionally confided the decision of the question of fact."*

Respectfully submitted.

JNO. W. PRESTON,
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W. E. HETTMAN,
Assistant United States Attorney,
Attorneys for Appellant.

Dated June 21, 1915.